Petition

81-1123

IN THE SUPREME COURT OF THE UNITES STATES

October Term 1981

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-

Elenor M. Catalina,
Plaintiff-Appellant

vs.

City of Columbus, Ohio
The Columbus Municipal Civil
Service Commission
Thelma I. Schoonover, Chairperson
John C. Young, Member
Walter R. Tarpley, Member,
Defendants-Appellees

(Ohio Supreme Court No. 81-811)

State, ex rel. Elenor M. Catalina,
Petitioner

vs.

Tom Moody, Mayor
Hugh Dorrian, City Auditor
David Ort, City Treasurer
Columbus Municipal Civil Service
Commission
Thelma I. Schoonover, Chairperson
Ben Espy, Member
Clifford R. Cloud, Member

(Ohio Supreme Court No. 81-810)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is the action of a municipal civil service commission void as an abridgment of free speech under the First Amendment and denial of life, liberty or property or equal protection of the law under the Fourteenth Amendment to the United States Constitution, where, following complaint by a tenured employee of coarse and threatening remarks by her superior, such employee is, contrary to rule, ousted from the workplace and pay without written charges; where alleged grounds for such action are not filed for 139 days; where the alleged grounds for such delayed charges are, under the city charter, heard and decided by said commission which itself made the charges; and where the commission issues no decision until 245 days after such ouster?

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DECISIONS AND ORDERS BELOW

Decision Court of Appeals of Franklin County, Ohio, No. 80-AP-392, Elenor M. Catalina, Appellant vs. Thelma I. Schoonover, Chairperson, Columbus, Municipal Civil Service Commission et al. - See Appendix A.

Order Ohio Supreme Court - No. 81-811 Overruling Motion to Certify - See Appendix C.

Order Ohio Supreme Court - No. 81-810 State ex rel Catalina vs. Moody, Mayor, City of Columbus Dismissing mandamus action for position and pay - See Appendix E

(For reference see Court of Appeals of Franklin County, Ohio, Case 81 AP 412, Elenor M. Catalina vs. Dale A. Crawford and Larry H. Robinson, Appendix F)

JURISDICTIONAL STATEMENT

Jurisdiction is conferred by 28 U.S.C. 1257 (2) to review the action of the Ohio Supreme Court with respect to claimed violations of the First and Fourteenth Amendments of the United States Constitution by the Municipal Civil Service Commission acting under the Columbus City Charter to deny its employee pay and position without written charges and timely hearing before a neutral tribunal. (See APPENDIX A, C and E for dates.)

CHARTER RULES AND STATUTES INVOLVED

The Charter of the City of Columbus, Ohio, Section 147, makes the Municipal Civil Service Commission the appointing authority of its own employees.

Section 149(m) requires that the Commission file written charges prior to suspension, demotion or removal.

Section 149-1 requires a hearing before the Commission.

Rules I 3 and XIII E 2 give the Commission power to hear appeals from its own removals.

Rule XIII F-2 requires that hearings begin in 10 days

Rule XIII F-5 i requires that hearings be completed in 90 days.

Ohio Revised Code Section 2506.03-.04 creates a presumption of regularity of administrative action.

STATEMENT OF THE CASE

On January 30, 1978, Dale Crawford, Executive Director, Columbus Municipal Civil Service Commission, called Mrs. Catalina, a tenured civil service employee to his office, where her superior, Mr. Robinson, was waiting, and informed Mrs. Catalina that people didn't like her, the Commission didn't like her or her reports; that she was antisocial, that she might not know statistics and that he didn't know if she was professional, and that she ought to hear what people were telling him. She asked for specifics but was not given any. Mr. Crawford said he was putting the pressure on and would keep it on. Transcript Vol. V pages 13 through 16. Transcript Vol. I page 58, lines 1 through 6.

On February 7, 1978 Mr. Robinson directed a memo to Mrs. Catalina asking her to acknowledge work assignments on 33 classifications. Transcript Vol. II page 86, 88. She responded that she would attempt to meet Mr. Robinson's August 1978 deadlines.

Exhibit 9, 9A.

By July, 1978, department heads had approved her classifications. Transcript Vol. III page 121, line 2.

Nevertheless, on July 28, 1978 Larry Robinson, her supervisor, the Personnel Assistant Director, called her into his office and said:

> "Now we can handle this in a professional manner or, if you prefer, you can join me in a pissing contest."
> Transcript Vol. V page 20, line 19.
> Transcript Vol. I page 25.

She complained of being harassed and asked that if action was intended against her it be commenced. Mr. Robinson then threatened her with "dire consequences." Transcript Vol. I pages 25 and 26. She asked what more was wanted of her and was heatedly told a report was wanted, but without explanation as to its type. Transcript Vol. V page 23.

The remarks by Mr. Robinson caused Mrs. Catalina to show signs of distress. The "Equal Employment Opportunity" officer of the commission, Marie Hardin, asked what the trouble was; to which Mrs. Cataline replied,

that Mr. Robinson had spoken to her in vulgar terms on July 28th. Transcript Vol. V page 29.

On September 6, 1978 Mr. Robinson required Mrs. Catalina to write a full review of her work, which she did on September 8, 1978. Exhibit 15. Thereafter Marie Hardin pressed Mrs. Catalina again as to how things were going with Larry Robinson and inquired as to the nature of the difficulty. Transcript Vol. V page 30. Mrs. Catalina responded that perhaps the matter would pass; but, when pressed as to what she thought of Larry Robinson, she responded, by way of analogy, that he was acting something like Idi Amin, that is, if he didn't want you he would get rid of you. Transcript Vol. V pages 30, 31 and 32.

On Friday, September 29, 1978, at 3:00 P.M., Mrs. Catalina was called to the office of Executive Secretary Crawford, an attorney, who accused her of lying about where she parked, not being competent and refusing to admit her incompetency. He told her to

leave the premises and not return pending a Civil Service Commission hearing. Transcript Vol. IV page 113, lines 7 through 14 (Proffer). The Executive Secretary suggested she could retire.

No written charges were given her at that time nor was any hearing set. Transcript Vol. IV page 115, lines 16 through 24. (Proffer). Transcript Vol. V page 124, lines 11 through 13. (Proffer).

Her work was reassigned. Transcript Vol. V page 91, line 16.

She wasn't allowed back at work. Transcript Vol. V page 107, line 6 through 8.

By a letter to her counsel dated November 10, 1978, Exhibit 16, Executive Secretary Crawford, still making no written charges against her, stated that such charges would be filed unless she "apologize," take a demotion, take a one year training program and have a personality adjustment evaluation.

On November 22, 1978, the Traffic Division classifications which she had developed,

Exhibit 26, were presented under the name Douglas Shupe, Exhibit 27, and adopted by the Commission, Exhibit 28, with no credit given to her for her work; but later falsely listed in charges against her. T Vol. IV page 26.

On January 23, 1979 the Executive Secretary wrote to her, Exhibit 20, referring again to the conditions under which she would be permitted to work, i.e., apologize, be demoted and have a personality adjustment evaluation, but still no written charges were presented to her.

On February 13, 1979 she filed case 79-CV-02-691 in the Court of Common Pleas against Dale A. Crawford and Larry Robinson as individuals, alleging that she was being excluded illegally from her work by them. She sought orders directing that she be permitted to return to do her work free of harrassments.

On February 14, 1979 Executive Secretary Crawford signed charges against her alleging that she had made a derogatory remark about her superior and alleging work

deficiencies. The charges were not signed by the Commission, her appointing authority.

She appealed to the Commission, requesting that she be permitted to work, Transcript Vol. I page 118, line 15. She proffered testimony that she was removed September 29, 1978 without charges. Transcript Vol. IV page 108 and pages 115, line 16 through 21. The Commission refused to state, for the record, what it knew about her September 29, 1978 removal without charges. Transcript Vol. IV page 106, line 11 through page 107, line 2. On May 31, 1979, a few days after she turned 65 years of age, the Commission discharged her on the basis of charges filed February 14, 1979, but without specific findings of fact as to alleged fault on her part and no findings whatsoever regarding her complaint of coarse harassment.

During 1978 and 1979 The Charter of The City of Columbus provided, in Section 149(m) that the Commission must make rules permitting discharge only on written charges. Section 149-1 required that employee appeals

be heard by the Commission. Section 147 made the Commission the appointing authority of its own employees.

By Rule I 3 "Appointing Authority" was defined to include the Commission. By Rule XIII E 2 the "appointing authority" was required to prepare and serve disciplinary charges. By Rule XIII F-1 employees were to appeal within ten days; by F-2 and F-51 hearings were to begin in ten days, and not be continued more than 90 days from the date of appointing authority action. (APPENDIX H).

(References have been made herein to the record to indicate the evidenciary basis available if the case is accepted for review. The decision in case 80 AP 392, APPENDIX A, sets forth the facts also.)

PROCEEDINGS BELOW

In proceedings before the Commission Mrs. Catalina made a record that she had been deprived of work and pay without charges for 139 days. A hearing commenced Feb. 26, 1979 was completed on May 31, 1979, a total of 245

days. From the Commission's May 31, 1979 order of discharge she appealed successively to the Court of Common Pleas and Court of Appeals of Franklin County and then sought further appeal which was denied, without opinion, by the Ohio Supreme Court on September 16, 1981, in case 81-811. In a companion mandamus case, 81-810 the Ohio Supreme Court without opinion, dismissed Mrs. Catalina's suit for reinstatement and back pay on September 23, 1981. From these companion orders of the Ohio Supreme Court petitioner requests certiorari to this court.

In the appeal proceedings petitioner raised the question of denial of free speech due process and equal protection by Assignments of Error One, Two, Three and Four set forth in APPENDIX B Ohio Supreme Court case 81-811, and also raised these issues in paragraph 8 of her mandamus action, Ohio Supreme Court case 81-810, APPENDIX D.

REASONS FOR ALLOWANCE OF WRIT

Mrs. Catalina sought to raise the question of arbitrary denial of work without charges September 29, 1978 by testimony before the commission and also in the appellate court. But the Court of Appeals, in ruling on Mrs. Catalina's Fourth Assignment of Error, held that no issue of due process was presented. This approach means that the civil service commission, which had the power to appoint and remove its own employee and then to hear appeals from its own actions, could orally oust an employee from work and pay for 139 days before filing charges inasmuch as, according to the court, hearings were completed, once begun, within the 90 day period required by commission rules.

How soon after ouster from work and pay must a post-termination hearing occur if due process is to be given the employee? Petitioner submits that the time for hearing should run from the event which interrupts tenure, i.e., denial of work and pay. In the case of State ex rel Tallant

vs. Board of Com'rs, 108 Southern Reporter 770, the reduction of pay was recognized as a denial of status. In Egan vs. Philadelphia, 113 Pa. Super Ct. 93, 172 A. 188, the power to suspend without pay for 30 days without a hearing was established by rule, the inference being that a period longer than 30 days would be a permanent removal. In Hawkins vs. Board of Education, 468 F. Supp 201 a failure to accord a formal hearing immediately, was condemned as denying due process. In the present case 245 days passed between September 29, 1978 and May 31, 1979, the formal discharge date.

To extend the time for formal hearing by having it run from when charges are filed, rather from when pay is stopped and duties are taken away, is inconsistent with the previous Ohio case of State ex rel Bay vs. Witter, 110 O.S. 216 where even a "suspension" of a day or two without written charges and prompt hearing was held to be void. See also Jackson vs. Kurtz, 65 Ohio App. 2d 152 (1979).

The requirements of Arnett vs. Kennedy, 416

U.S. 134, for written charges, and an unbiased tribunal are evaded if both the charges and hearing are long delayed.

Courts have protected the right of public employees to express their opinions without fear of retaliation by arbitrary denial of pay. Hostrop vs. Board of Junior College, 471 F.2d 488; Perry vs. Sinderman 408 U.S. 593; Pickering vs. Board of Education, 391 U.S. 563; Sorin vs. Board of Education, 39 Ohio Misc. 108, 68 O.O. 2d 270, 315 N.E. 2d 848.

These cases established a protected right not to be deprived of tenured civil service work without due process, particularly where free expression is involved. Elrod vs. Burns, 96 S. Ct. 2673 extended protection to unclassified employees. Arnett vs. Kennedy, 416 U.S. 134 delineated the need for written charges and a post-termination hearing before a disinterested tribunal.

But the due process protection of the government employee "whistleblower" has not been fully delineated by either the Ohio Courts or the federal courts. We respectfully point

out that the Franklin County Court of Appeals avoided the due process question by saying that the due process issue no longer exists once the government files charges.

The nature of the free speech to be protected here differs from that of Julian Bond to speak out against the Viet Nam war though he was a legislator. Bond vs. Floyd, 385 U.S. 135.

It differs a bit from the free speech of City Councilman Kucinich, to question propriety of other councilmens' actions, despite a rule of council precluding criticism. Kucinich vs. Forbes, 432 F. Supp. 1101.

Yet the right to speak privately to an Equal Employment Opportunity officer concerning coarse and threatening remarks of a supervisor free of retaliatory loss of pay is of great importance. To allow deprivation of pay for long periods before a hearing will mean that no harassed employee dare complain; that supervisors may bring in their friends to replace existing employees using threats of "dire consequences", insults and

coarse language to try to force resignations of career employees. All this is contrary to federal and state statutes which attempt to afford job tenure to hundreds of thousands of employees.

This court in Perry vs. Sinderman indicated the importance of a hearing to protect ones good name so that one could work elsewhere. If charges are not filed for 139 days and no hearing concluded for 245 days, the employee is deprived of both pay and a prompt opportunity to clear one's name. Additionally the delay in hearing stands as an implied threat to all employees that no complaint against a superior will be tolerated, thus tending to protect those superiors who are illegally trying to oust civil service employees from their jobs.

The Charter of the City of Columbus is constitutionally deficient. The commission is the appointing authority under Sec. 147 and Rule I-3. The commission is the charging party under Rule 149(m) and Rule XIII E-2 and F-2, but also the hearing tribunal for

hearing charges against its own employees under Sec. 149-1. The Court of Appeals of Franklin County considered this an anomaly but no denial of due process, contrary to the principles of Goldberg vs. Kelly, 397 U.S. 254. The Court of Appeals and the Ohio Supreme Court which denied review and denied mandamus are in conflict with the principles laid down by a federal appeals court in Hostrop v. Board, 471 Fed.2d 488 where written charges before removal were held to be essential to due process. It is the thinking of the Court of Appeals of Franklin County, Ohio, set forth in the referenced decision in Catalina vs. Dale Crawford and Larry Robinson, 81 AP 412, APPENDIX F, that Mrs. Catalina has an adequate remedy by suing these men personally in damages. Such an approach is inconsistent with Hawkins v. Board of Education, 468 F. Supp. 201, where the actions of the Personnel Director of a Board of Education in usurping removal authority unto himself and discouraging formal, prompt appeal to the

Board were condemned. The Ohio courts say that a board cannot be held accountable for denying pay and duties, written charges and a prompt hearing inasmuch as the employee may sue the subordinates who failed to give written charges and a prompt hearing. 42 U.S.C. 1983, we submit, was not intended to relieve a board of due process requirements by giving a cause of action for damages against officials. Section 1983 recoveries are made because due process or other law violations occurred. Section 1983 does not preclude raising the illegality directly by appeal and/or mandamus.

The bias of the commission is seen in that it made no adjucation whatsover of Mrs. Catalina's complaint of threats of dire consequences and coarse language directed to her. The Charter lets a commission which has used improper means to oust an employee sit in judgment of its own illegal act. Ohio Revised Code 2506.03 and .04 then clothes the illegal determination with a presumption of regularity. The Charter and

Rules are in these respects unconstitutional. Phillips vs.Board; 24 Ill. App.3d 242 (1972).

The pending damage suit, even if successful against the claimed defense of immunity of government officials, will not take away the stigma and loss of professional standing as a career civil service Personnel Analyst occassioned by three years of illegal separation from work and pay. Only restoration to position will vindicate the professional standing of this career employee and permit her to support herself in her life work for the remainder of her career, free of economic dependence on others.

Respectfully,
Robert D. Holmes
Counsel For Petitioner

CERTIFICATE OF SERVICE

Three copies of this Petition For Writ Of Certiorari and Appendix were mail to Gregory Lashutka,City Attorney, 90 W. Broad Street, Columbus, Ohio, 43215, by U.S. mail on Dec. 14, 1981.

Robert D. Holmes
Robert D. Holmes
Counsel for Petitioner

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Elenor Catalina,	:	
	:	
Appellant	:	
	:	
vs.	:	Case No. 80AP-392
	:	
Thelma I. Schoonover, Chairman, Columbus Municipal Civil Service Commission, et al.,	:	DECISION
	:	Rendered April 9, 1981
	:	
Appellees	:	

MOYER, J. This matter is before us on the appeal of Elenor Catalina (Catalina) from a judgment of the Common Pleas Court of Franklin County affirming the decision of the Columbus Municipal Civil Service Commission (Commission) discharging Catalina from employment.

On Friday, September 29, 1978, Catalina was sixty-four years old and had been a classified employee of the Commission for twenty-two years. She was classified as a Personnel Analyst III. On that date, the Commission's executive secretary, then Dale Crawford, called Catalina to his office at 3:00 p.m. His testimony indicates that he told Catalina that, because of problems with her work and her relations with superiors in her office, she was to leave the premises. He also told

her she would be paid for her work on that day and instructed her to call her supervisor the following Monday to indicate whether she would take a voluntary vacation or return to work and be suspended pending disciplinary proceedings. No written charges were issued to Catalina at that time.

Catalina did not return to work. She claims she periodically called her supervisor to tell him she was on involuntary leave. The executive secretary sent a letter to Catalina's attorney outlining conditions under which Catalina could return to her employment without facing disciplinary action. The conditions included an apology, "voluntary" demotion, and training, all of which Catalina chose not to accept.

On February 13, 1979, Catalina filed a complaint in Common Pleas Court against the Commission, alleging she was being wrongfully excluded from employment. The following day written charges were issued to Catalina. The Commission held a series of hearings and discharged Catalina on May 31, 1979.

Catalina appealed that decision to the Common Pleas Court of Franklin County, and her appeal to this court is from the judgment of the Common Pleas Court. In support of her appeal she raises the following seven assignments of error:

> "1. The Court erred in failing to find that the May 31, 1979 order of the Commission violated Columbus City Charter Section 149 and the rules thereunder requiring timely written charges."
>
> "2. The Court erred in holding that the Commission's actions were legal where a hearing was not promptly held as required by City Charter and rules."
>
> "3. The Court erred in permitting the Commission's denial of cross-examination as to a written report received into evidence."
>
> "4. The Court erred in permitting the Commission's denial of proffered testimony as to the acts of its Executive Secretary in effecting a removal without timely written charges."
>
> "5. The Court erred in supporting the Commission's finding of alleged failure to follow equal opportunity guidelines where there was no evidence of such alleged failure."
>
> "6. The Court erred in failing to find that the action of the Commission was unconstitutional, illegal, arbitrary, capricious,

and/or unreasonable within the meaning of R. C. 2506.04."

"7. Irrespective of whether the discharge was legal, the Court erred in failing to find that the Commission's action was unsupported by the preponderance of substantial, reliable and probative evidence within the meaning of R. C. 2506.04."

The City Charter of Columbus and the rules promulgated thereunder require that an employee be given written charges prior to discharge or reduction in rank. Columbus City Charter, Section 149(m); Rules and Regs. of Municipal Civil Service Commission of Columbus, Rule XIII E. The Commission concedes that Catalina was given no written charges at the time she was originally excluded from her work place, September 29, 1978. However, she was served with written charges prior to the time any official disciplinary action was taken against her. The charges were extensive and included an allegation of inefficiency, neglect of duty and inability to perform her job as a Personnel Analyst III, as well as threatening and intimidating other employees which caused

staff inefficiency and uneasiness. The second charge included a specific allegation that Catalina on September 27, 1978, referred to a supervisor as "the 'Idi Amin' of Civil Service and implied that the supervisor could be killed if he did not stop harassing you."

The charges are specific and detailed and comply with the requirements of the City Charter and regulations in question. The issue is whether those charges should have been given to Catalina prior to any job-related action by her employer. The Commission believed that the matter of due process was not before it in its hearing on Catalina's discharge. As written charges had been filed prior to the hearing, the Commission assumed jurisdiction had been properly invoked.

The trial court apparently also believed that the matter of back pay for the period from September 29, 1978 to February 14, 1979, when Catalina was on voluntary or involuntary leave, should have been the subject of the suit filed by Catalina in Common Pleas Court in February of 1979. Although not a part of

the record before us, that suit purportedly dealth with her alleged illegal exclusion from her employment, rather than the discharge which is the subject of the action before us. We agree with the trial court that if the jurisdiction of the Commission was properly invoked, as it was, the only matter before us for review is whether the action of the Commission in discharging Catalina was supported by the evidence properly adduced at the hearing.

It could be argued that the actions of the director of the Commission between September 29, 1978 and the date Catalina was given written charges were in effect a form of duress, which caused her to in effect be discharged from her job. A close review of the correspondence and the testimony of the director causes us to conclude that his actions cannot be so defined. He gave Catalina several conditions under which she could return to her employment, one of which was a demotion in her job position. However, it is significant that the conditions were not a

prerequisite to keeping her job but, rather, to the Commission's not initiating disciplinary action against her. She had been permitted to take a substantial amount of her vacation time following September 29, and sick leave following November 17, 1978, until January 29, 1979. During that period of time, no disciplinary action was taken against Catalina nor was she demoted or discharged. Her due process rights were not violated during that period of time.

The requirements of due process include, inter alia, a hearing before an impartial tribunal. Catalina complains about the impartiality of the Commissioners, although not raising it as an assignment of error. The fact that the Commission was both her employer and the tribunal before which her discharge was heard is an aberration in the law. However, any prejudice to her could have been cured by a trial de novo in the Court of Common Pleas. Catalina apparently considered requesting a trial de novo but did not. She has, therefore, waived any

defect which may have inured from the dual role of the Commission. The first assignment of error is not well taken and is overruled.

In support of her second assignment of error, Catalina argues that the Commission did not hold "prompt" hearings as required by the Columbus City Charter and the Commission Rules. Rule XIII F-2 requires that a first hearing be set for no later than ten days after the date of the filing of an appeal. Rule XIII F-1 provides that a hearing may be continued for no more than ninety days. The charges against Catalina were filed February 14, 1979 and the first hearing held on February 26, 1979. Although it is not clear when Catalina's appeal to the Commission was filed, even if it was on February 14, there is nothing to indicate that the delay of two days in any way prejudiced Catalina. The final hearing on Catalina's case was held May 10, which is within ninety days of February 26 (or February 14). Catalina's second assignment of error is not well taken

and is overruled.

In support of her third assignment of error, Catalina claims the Commission denied her attempt at cross-examination of a witness with respect to a written report regarding Catalina's work at the Commission. David Kriska testified regarding her work and later submitted a report concerning her work. The report was admitted into evidence. Catalina claims that she was denied the right of cross-examination of the witness regarding the unsworn document. However, a reading of the transcript reveals that Catalina's counsel objected to introduction of the document but did not request an opportunity to recall Kriska for cross-examination. There is no indication that Kriska was no longer available as a witness or that the Commission would have not recalled him. There was no denial of a right to cross-examination, and the third assignment of error is overruled.

Catalina argues that the Commission erred by failing to admit testimony of her brother

concerning the events of September 29, 1978. As our discussion of the first assignment of error makes clear, the circumstances of her exclusion from the work place at that time were not in issue before the Commission; the Commission was concerned only with her discharge and the evidence supporting the charges against her. The fourth assignment of error is overruled.

In her fifth assignment of error, Catalina challenges the Commission's finding that she had failed to follow equal opportunity guidelines. The evidence on that point is equivocal. However, the Commission sat as the trier of fact and we may not substitute our judgment for theirs. C. E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St. 2d 279. Even if the Commission had not found this charge to be valid, there was ample evidence to support the other allegations which in themselves would have justified Catalina's discharge. The fifth assignment of error is overruled.

Catalina's argument that the action of the

Commission is unconstitutional, illegal, arbitrary, and capricious is not supported by her references to the record. We previously disposed of the question of whether she was given written charges and a timely hearing. She fails to convince us that the action was illegal, arbitrary or capricious or unreasonable. Her references to the record are examples of the Commission's exercise of discretion against her. However, the Commission's action was not "so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty." Cincinnati v. Pub. Util. Comm. (1978), 55 Ohio St. 2d 168. The sixth assignment of error is overruled.

In support of her final assignment of error, Catalina asserts that the Commission's action was unsupported by the preponderance of substantial, reliable and probative evidence. The Supreme Court has made the following comments regarding the standard to be applied by reviewing courts under R. C. 2506.04:

"* * *

"Thus, it is quite evident that the Court of Common Pleas must weigh the evidence in the record, and whatever additional evidence may be admitted pursuant to R. C. 2506.03, to determine whether there exists a preponderance of reliable, probative and substantial evidence to support the agency decision. We caution, however, to add that this does not mean that the court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. The key term is 'preponderance.' If a preponderance of reliable, probative and substantial evidence exists, the Court of Common Pleas must affirm the agency decision; if it does not exist, the court may reverse, vacate, modify or remand.

"In determining whether the standard of review prescribed by R. C. 2506.04 was correctly applied by the Court of Common Pleas, both this court and the Court of Appeals have a limited function. * * * ." (Dudukovich v. Housing Authority (1979), 58 Ohio St. 2d 202, at 207.)

Catalina has referred to some evidence which supports her contention that her work was satisfactory. However, there is also a substantial amount of evidence from reliable sources which tends to prove the allegations against her. She has not convinced us that the evidence preponderates in her favor. The seventh assignment of

error is not well taken and is overruled.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

STRAUSBAUGH, P.J., and COOK, J., concur.

COOK, J., of the Eleventh District Court of Appeals, sitting by assignment in the Tenth District Court of Appeals.

MEMORANDUM IN SUPPORT OF JURISDICTION

Proposition of Law No. 1

Article XV, Section 10 of the Ohio Constitution and Section 149 of the Charter of the City of Columbus, Ohio, and regulations thereunder, prohibit the removal, demotion or suspension from office of a tenured civil service employee without written charges delivered to such employee prior to or contemporaneous with exclusion from position and pay. Verbal suspension and acts depriving such employee of position and pay for extended periods of time violate said Charter and violate Article I, Section 16 of the Ohio Constitution on administration of justice without denial or delay and are a nullity.

Perry vs. Sinderman, 408 U.S. 593 (1972)
State, ex rel. Bay vs. Witter, 110 O.S. 216
Truax vs. Raich, 239 U.S. 35 (1915)

Proposition of Law No. 2

The exclusion of a tenured civil service employee from position and working pay, without written charges, upon condition that the employee take a demotion, be evaluated by a psychologist and serve in a demoted capacity under threat of further unknown discipline, violates the Ohio Constitution Article XV, Section 10 on civil service, the Charter of the City of Columbus and rules thereunder and the Fifth and Fourteenth Amendments to the United States Constitution on due process.

Arnett vs. Kennedy, 416 U.S. 134 (1974)
Jackson, Appellant vs. Kurtz, 65 O. App. 2d 152 (1979)
Marshall, Appellee vs. City of Columbus, 61 O.S. 2d 353
Sorin vs. Board of Education, 39 Ohio Misc. 108, 68 O.O. 2d 270

APPENDIX B

Proposition of Law No. 3

Where no written charges are promptly filed and timely heard, suspension, attempted demotion and exclusion from pay and duties of a civil service employee who complains of aggression against her by her supervisors violates Article I, Section 11 of the Ohio Constitution, on free speech, Article I, Section 1 on inalienable rights and the First Amendment of the United States Constitution, on free speech.

Bond vs. Floyd, 385 U.S. 135
Kucinich vs. Forbes, 432 F. Suppl. 1101
Pickering vs. Board of Education, 391 U.S. 563

Proposition of Law No. 4

Exclusion from work upon suggestions of retirement and failure to furnish a 64 year old civil service employee with written charges for 139 days after excluding such employee from pay and position, where other employees are surrounded by proper due process safeguards, denies such employee of equal protection of the laws in violation of Article I, Section 2 of the Ohio Constitution and is prohibited.

THE SUPREME COURT OF OHIO

Elenor M. Catalina,	:	1981 TERM
Appellant,	:	To wit: Sep 16 1981
vs.	:	No. 81-811
City of Columbus et al.,	:	MOTION FOR AN ORDER DIRECTING THE COURT
Appellees.	:	OF APPEALS
	:	for FRANKLIN County
	:	TO CERTIFY ITS RECORD
	:	

It is ordered by the Court that this motion is overruled.

APPENDIX C

IN THE SUPREME COURT OF OHIO

State, ex rel. Elenor M. Catalina,	:	
Relator	:	
vs.	:	
Tom Moody, Mayor	:	
Hugh Dorrian, City Auditor	:	
David Ort, City Treasurer	:	Case No. 81-810
The Columbus Municipal Civil Service Commission Thelma I. Schoonover, Chairperson Ben Espy, Member Clifford R. Cloud, Member,	:	
Respondents	:	

APPENDIX D

PETITION IN MANDAMUS

1. Petitioner on September 29, 1978 was a tenured classified civil service employee of the Columbus Municipal Civil Service Commission of the City of Columbus, Ohio.

2. On that date the City of Columbus and its civil service commission deprived petitioner of her pay and position without written charges or timely hearing in violation of Section 149 of the Charter of the City of Columbus and rules thereunder, in the following amounts, to date:

September 29, 1978 to December 23, 1978 at $9.20/hour . . . . . $ 4,416.00

December 24, 1978 through December 22, 1979 at $9.84/hour plus service credit $20,915.00

December 23, 1979 through December 20, 1980 at $10.53/hour plus $275 service credit $22,249.40

December 21, 1980 through March 28, 1981 at $11.17/hour . . . . . $ 5,361.60

March 29, 1981 through May 29, 1981 at $11.37/hour . . . . . $ 4,093.20

The total: $57,035.20

3. By reason of such illegal action petitioner was deprived of the following benefits conferred by state statutes and

municipal ordinances in amounts readily ascertainable based on such statutes and ordinances, namely: the employer contributions to the public employees retirement system, life, medical and dental insurance and accruals of vacation and sick pay.

4. Petitioner appealed her wrongful removal to the Columbus Municipal Civil Service Commission when, after 139 days she was given purported charges, but said Commission which had brought the belated charges declined to consider her removal without timely charges, pass upon the legality of the same or consider her claim for back pay.

5. Petitioner prosecuted all available appeals. The Court of Appeals of Franklin County, Ohio, contrary to the Charter and Ohio and Federal Constitutions, erroneously found no denial of due process in the methods used to deprive petitioner of her pay, position and fringe benefits.

6. Petitioner has prosecuted a further appeal to this court from such erroneous finding of said Court of Appeals. Petitioner has no

adequate remedy at law or further appeal.

7. The Columbus Municipal Civil Service Commission, her appointing authority, not only removed petitioner without written charges and a timely hearing, but thereafter purported to sit in judgment of what it had done. By reason of delays in proceeding against her and the bias of the tribunal, petitioner was deprived not only of a timely hearing but also of a fair, due process hearing.

8. Petitioner was denied timely charges and hearing and subjected to coercive comments by the Commission acting through its superior officers as a part of an effort to secure her retirement, contrary to the Charter and Rules thereunder, in violation of Article I, Section 1 of the Ohio Constitution, in violation of the equal protection clause of the Ohio Constitution, Article I, Section 2; the Fifth and Fourteenth Amendments to the United States Constitution; in violation of her right to prompt redress under Section 16 of Article I of the Ohio Constitution, and in retaliation

for her exercise of the right of free speech in objecting to coercive comments by her superiors, in violation of the United States Constitution, First Amendment.

9. Petitioner has a clear legal right to restoration to her position and pay as of September 29, 1978 to date.

10. Petitioner has found it necessary to retain legal counsel and pay various litigation expenses and costs incident to this action.

11. Wherefore petitioner prays for an alternative writ and ultimately for a peremptory writ to issue to the respondents requiring them to reinstate her to her position and to award her back pay and all fringe benefits aforesaid from September 29, 1978 to the time of such restoration, for her counsel fees, costs and legal expenses plus interest on the sums and/or benefits withheld from her, and for such other or different relief which upon the facts may be just.

Robert D Holmes

Robert D. Holmes

STATE OF OHIO, FRANKLIN COUNTY ss:

Elenor M. Catalina, being first duly sworn, says that she has read the foregoing petition and it is true.

Elenor M. Catalina

Sworn to before me and subscribed in my presence this 29th day of May, 1981.

Robert D. Holmes
Notary Public

OHIO SUPREME COURT

The State of Ohio, ex rel.:
Elenor M. Catalina, 1981 TERM
Relator, :
To wit: September 23, 1981
vs. :

Tom Moody, Mayor, et al., : No. 81-810
Respondents.
: IN MANDAMUS

This cause originated in this court on the filing of a complaint for a writ of mandamus and was considered in the manner prescribed by law. On consideration thereof, it is ordered by the court that the respondents' motion for judgment on the pleadings is treated as a motion to dismiss and, as such, is sustained, and the cause is dismissed.

APPENDIX E

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

Elenor M. Catalina, :

Plaintiff-Appellant, :

v. :

Dale A Crawford, :
and
Larry H. Robinson, :

Defendants-Appellees. :

No. 81AP-412

DECISION
Rendered on October 22, 1981.

McCORMAC, J.

Plaintiff, a civil service employee of the Columbus Municipal Civil Service Commission, filed a complaint in Franklin County Common Pleas Court on February 13, 1979, alleging that defendants, who were the first and second ranking employees of the commission, engaged in improper courses of conduct against her and excluded her from work contrary to law. She sought a judgment for compensatory and punitive damages, attorney fees and an injunction against defendants to restrain them from interfering with her work performance.

Defendants answered, denying improper conduct on their part and also asserted that plaintiff had failed to state a claim upon

which relief could be granted.

On February 14, 1979, written charges were issued to plaintiff. She appealed to the Civil Service Commission who, after a series of hearings, discharged her on May 31, 1979. Plaintiff appealed that decision to the Franklin County Common Pleas Court, who affirmed the decision, and to this court who, in unreported case No. 80AP-392, Catalina v. Schoonoyer, et al., rendered on April 9, 1981 (1981 Decisions, Page 865), affirmed the Court of Common Pleas.

After the Franklin County Common Pleas Court rendered its decision affirming the Civil Service Commission, defendants filed a motion for summary judgment based upon res judicata. After this court rendered its judgment of April 9, 1981, the trial court sustained the motion for summary judgment, noting that the issue of the time period from September, 1978 until January, 1979 was not specifically before the appellate court but that the court did refer to this time period in relation to plaintiff's claim

of lack of due process and concluded there was no merit to the claim, as she could have returned to work at any time. The trial court concluded that plaintiff either litigated or had an opportunity to have her cause completely litigated in the previous case, which was the subject of the appeal in case No. 80AP-392, and that she was therefore barred by the doctrine of res judicata.

Plaintiff has appealed, asserting the following assignments of error:

> "1. The Court of Common Pleas erred in holding that the decision of the Court of Appeals of Franklin County, in Case 80 AP 392 was dispositive of Case 79 CV 02-691.
>
> "2. Even if the decision in Case 80 AP 392 were applicable in whole or in part, it does not represent the law of Ohio, or applicable federal law."

The final judgment rendered as a result of the appeal in case No. 80AP-392 relates only to the validity of the decision of the Columbus Municipal Civil Service Commission which resulted in plaintiff's discharge from her employment based upon the written notice of charges filed February 14, 1979. In our decision in case No. 80AP-392, we noted that

the Municipal Civil Service Commission had conceded that plaintiff was given no written charges at the time she was originally excluded from her work place on September 29, 1978. We also stated as follows:

> "The trial court apparently also believed that the matter of back pay for the period from September 29, 1978 to February 14, 1979, when Catalina was on voluntary or involuntary leave, should have been the subject of the suit filed by Catalina in Common Pleas Court in February of 1979. [This case.] Although not a part of the record before us, that suit purportedly dealt with her alleged illegal exclusion from her employment, rather than the discharge which is the subject of the action before us. We agree with the trial court that if the jurisdiction of the Commission was properly invoked, as it was, the only matter before us for review is whether the action of the Commission in discharging Catalina was supported by the evidence properly adduced at the hearing.
>
> "It could be argued that the actions of the director of the Commission between September 29, 1978 and the date Catalina was given written charges were in effect a form of duress, which caused her to in effect be discharged from her job. * * *."

Following thereafter is an analysis of the correspondence and testimony of the director from which the trial court concluded that plaintiff's due process rights were not violated during the period from September 29, 1978 until February 13, 1979.

The judgment in case No. 80AP-392 is dispositive of the issue of whether appellant was lawfully discharged from her employment based upon the written notice of February 14, 1979. From that period on, she is precluded by the doctrine of res judicata from obtaining a contrary result in this case.

However, there has been no determination of plaintiff's rights for damages for illegal exclusion from her employment by improper conduct of defendants for the period of time from September 29, 1978 through February 13, 1979. Both the Common Pleas Court and the Court of Appeals in case No. 80AP-392 concluded that the appeal from the Civil Service Commission did not give jurisdiction to the courts over that aspect of the case, which would be decided in the case for damages filed February 13, 1979 (this case). There was no determination in case No. 80AP-392 as to whether plaintiff was on voluntary or involuntary leave during the period of September 29, 1978 through February 13, 1979, or whether she was illegally excluded from her employment by duress by

defendants during this period.

The trial court erroneously concluded that the doctrine of res judicata or collateral estoppel barred plaintiff from pursuing her claim against defendants for illegal exclusion from her employment from the period of September 29, 1978 through February 13, 1979, as there has been no previous determination, factual or otherwise, concerning that claim for relief. Plaintiff had no opportunity to litigate the issue of illegal exclusion from her employment in case No. 80AP-392 and is not barred in this case by failing to adjudicate the matter therein, it having been held that there was no jurisdiction as to that claim in the appeal from the Civil Service Commission.

Plaintiff's first assignment of error is sustained to the extent that the decision in case No. 80AP-392 was not dispositive of the claim of illegal exclusion from her employment by defendants for the period from September 29, 1978 through February 13, 1979. Plaintiff has never been given an opportunity to litigate that claim in court, nor has there been

any issue litigated that would bar recovery for that claim by the doctrine of collateral estoppel.

Plaintiff's second assignment of error is overruled as being moot.

Plaintiff's first assignment of error is sustained to the extent indicated in this decision. Plaintiff's second assignment of error is overruled.

The judgment of the trial court is reversed and the case is remanded to the trial court for further procedure consistent with this decision.

Judgment reversed and case remanded.

REILLY and CELEBREZZE, JJ., concur.

CELEBREZZE, J., of the Eighth District Court of Appeals sitting by Assignment in the Tenth District Court of Appeals.

Sec. 147. Officers of commission. The commission shall designate one of its members as president, shall appoint a secretary, and such other officers and employees as council may provide.

Sec. 149(m).
Sec. 149. Rules. The commission shall prescribe, amend and enforce rules for the classified service, shall keep minutes of its proceedings and records of its examinations and shall make investigations concerning the enforcement and effect of the civil service provisions and rules thereunder. It shall make an annual report to the Mayor. The rules shall provide:...

(m) For discharge or reduction in rank or compensation, only after the person to be discharged or reduced has been presented with the reasons for such discharge or reduction, specifically stated in writing, and has been given an opportunity to be heard in his own defense. The reason for such discharge or reduction and any reply in writing thereto by such employe shall be filed with the commission.

APPENDIX G

RULES AND REGULATIONS OF THE MUNICIPAL CIVIL SERVICE COMMISSION CITY OF COLUMBUS, OHIO

RULE 1

3. Appointing Authority:

An individual, officer, commission, agency, board or body having the power under the Charter or Columbus City Codes of appointment to, or removal from, a position with the City.

E. Disciplinary Action by the Appointing Authority.

2. The appointing authority shall prepare written charges and specifications and deliver such charges and specifications either personally or by regular mail, to the em;loyee's address on file with the Commission.

F. Employee Appeals to the Commission

1. Right to Appeal. Except as otherwise provided in the Charter, an employee who is suspended, reduced in rank, position or compensation or discharged, may appeal such decision, order, or action to the Commission. Such appeal must be on forms prescribed by the Commission and be taken within ten calendar days from the cate of such decivion, order or action. Except as otherwise provided in Rule XIII (G), no appeal to the Commission shall lie from the action of an appointing authority in issuing a verbal or written reprimand or action of the Commission or its staff with respect to action taken against applicants to the City Service.

2. Setting of Appeal. Upon receipt by the Commission of an appeal, the appointing authority issuing such decision or order shall be notified by the Commission of the appeal. The Commission shall set the appeal for a first hearing at a regular meeting within ten calendar days from the receipt of such appeal. All parties shall be notified in writing by the Commission of the time, place and date of the first hearing of the appeal.

5. Hearing Procedure.

1. Any hearing may be continued by the Commission at the request of either party or the Commission. However, no hearing shall be continued beyond ninety days from the date of the action of the appointing authority.

OHIO REVISED CODE 2506.03

The hearing of such appeal shall proproceed as in the trial of a civil action but the court shall be confined to the tranactipt or by affidavit filed by the appellant that:

(A) The transcript does not contain a report of all evidence admitted or proferred by the appellant.

(B) The appellant was not permitted to appear and be heard in person or by his attorney in opposition to the order appealed from:

(1) to present his position, arguments and contentions;

(2) To offer and examine witnesses and present evidence in support thereof;

(3) To cross-examine witnesses purporting to refute his position, arguments and contentions;

(4) To offer evidence to refute evidence and testimony offered in opposition to his position, arguments and contentions;

(5) To proffer any such evidence into the record, if the admission thereof is denied by the officer or body appealed from.

(C) The testimony adduced was not given under oath.

(D) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant

opportunity to use the power of subpoena when possessed by the officer or body.

(E) The Officer or body failed to file with the transcript, conclusions of fact supporting the order,adjudication or decision appealed from; in which case, the court shall hear the appeal upon the transcript and such additional evidence as may be introduced by any party. At the hearing, any party may call as if on cross-examination, any witness who previously gave testimony in opposition to such party.

OHIO REVISED CODE 2506.04

The court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable. or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or mofidy the order, adjudication or decision, or remard the cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law pursuant to sections 2505.01 to 2505.45, inclusive, of the Revised Code.

APPENDIX I

Opposition

Office - Supreme Court, U.S.
FILED
FEB 4 1982
ALEXANDER L. STEVAS,
CLERK

Case No. 81-1123

In The Supreme Court Of The United States

October Term 1981

Elenor M. Catalina

Petitioner-Appellant

vs.

City of Columbus, et al.

Respondents-Appellees

On Petition For Writ of Certiorari to the Supreme Court of Ohio in Case No. 81-810;

On Petition For Writ of Certiorari to the Court of Appeals for Franklin County, Ohio, in Case No. 81-811

Brief In Opposition

CITY OF COLUMBUS, DEPARTMENT OF LAW
GREGORY S. LASHUTKA, CITY ATTORNEY

Patrick M. McGrath, Counsel of Record

Donald R. Keller
City Hall, 90 West Broad Street
Columbus, Ohio 43215
(614)222-7460

For Respondents-Appellees.

QUESTION PRESENTED FOR REVIEW

Whether the Court has jurisdiction to review judgments on writ of certiorari where the federal questions were not timely and properly raised in the appellate court of first instance in one judgment, and where the second judgment was based upon an interpretation of state law and did not involve a determination of a federal question?

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DECISIONS AND ORDERS BELOW

In the Matter of Elenor Catalina, rendered May 31, 1979, [Appendix A]

Elenor Catalina, Appellant v. The Columbus Municipal Civil Service Commission, et al., Appellees, Case No. 79CV-06-2844, rendered April 25, 1980 [Appendix B]

Elenor Catalina, Appellant v. Thelma I. Schoonover, Chairman, etc., et al., Appellees, Case No. 80AP-392, rendered April 9, 1981 [Appendix C]

Elenor Catalina, Appellant v. City of Columbus, et al., Appellees, Case No. 81-811, rendered September 16, 1981 [Appendix D]

The State of Ohio, ex rel. Elenor Catalina, Relator v. Tom Moody, Mayor, et al., Respondents, Case No. 81-810, rendered September 23, 1981 [Appendix E]

The State of Ohio, ex rel. Elenor Catalina, Relator v. Tom Moody, Mayor, et al., Respondents, Case No. 81-810, rehearing, October 21, 1981 [Appendix F]

STATE STATUTES INVOLVED

R. C. § 2506.01:

Appeal from decisions of any agency of any political subdivision.

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.

The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person; nor any order issued preliminary to or as a result of a criminal proceeding.

R. C. 2506.04:

Finding and order of court.

The court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication or decision, or remand

the cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law pursuant to sections 2505.01 to 2505.04, inclusive, of the Revised Code.

R. C. § 2731.05:

Adequacy of law remedy bar to writ.

The writ of mandamus must not be issued when there is plain and adequate remedy in the ordinary course of the law.

STATEMENT OF THE CASE

On Friday, September 29, 1978, petitioner was called to the office of the Executive Secretary of the Columbus Civil Service Commission. The executive secretary informed petitioner that because of problems with her work and relations with her supervisor she was relieved of duties with pay for the remainder of the day. Petitioner was not presented with written charges during the meeting. Petitioner was instructed to call her immediate supervisor the following Monday to indicate whether she would take paid vacation leave or return to work for service of charges and suspension pending disciplinary proceedings.

Petitioner did not return to work the following week. The Executive Secretary sent a letter to petitioner's attorney outlining conditions under which she could return to work without facing disciplinary charges. The conditions were not a prerequisite to keeping her job, but rather an alternative to initiation of disciplinary charges. Petitioner elected to reject the conditions and remain off the job.

From September 29, 1978 until November 16, 1978, petitioner was placed on paid vacation leave. Petitioner was granted paid sick leave from November 17, 1978 until January 29, 1979. During the period of paid leave disciplinary charges were not initiated nor was disciplinary action taken against petitioner. Petitioner was merely carried on paid leave.

On February 14, 1979, the Civil Service Commission issued written charges. The Civil Service Commissioners held a series of hearings between February 26, 1979 and May 10, 1979, memoralized by nearly 600 pages of testimony and numerous exhibits. On May 31, 1979, petitioner was discharged by the Civil Service Commission [Appendix A].

Petitioner timely appealed the discharge to the Common Pleas Court of Franklin County, Ohio, pursuant to R. C. 2506.01. On May 12, 1980, the Common Pleas Court affirmed the decision of the Columbus Civil Service Commission [Appendix B]. Petitioner appealed to the Court of Appeals for Franklin County which affirmed the judgment of the common pleas court on

April 9, 1981 [Appendix C].

Thereafter, petitioner filed a motion to certify the record of the appeals court to the Ohio Supreme Court, Case No. 81-811. It was not until petitioner filed a memorandum in support of the motion to certify the record of the appeals court that petitioner articulated and assigned federal constitutional questions as grounds for reversal of the action of the Columbus Civil Service Commission [See, Petition For Writ of Certiorari, p. 14]. Respondents opposed the motion, inter alia, on the ground petitioner had not raised constitutional issues in the proceedings below. On September 16, 1981, the Ohio Supreme Court overruled the motion [Appendix D].

At the same time petitioner sought appellate review of her discharge by the Ohio Supreme Court, petitioner filed an original action in mandamus, Case No. 81-810 in the Ohio Supreme Court asserting state and federal constitutional violations. Respondents moved for judgment on the pleadings in the mandamus action on the grounds that petitioner had an adequate remedy at law by way of appeal which required denial

of the writ as a matter of state law (R. C. 2731.05), and that res judicata precluded petitioner from raising the constitutional issues in the collateral action because the courts which reviewed petitioner's administrative appeal had jurisdiction by state statute (R. C. 2506.04) to hear and determine constitutional questions had petitioner timely asserted said issues [Appendix G].

The Ohio Supreme Court treated respondents' motion for judgment on the pleadings as a motion to dismiss and sustained same [Appendix E]. The Ohio Supreme Court overruled petitioner's motion for rehearing on October 21, 1981 [Appendix F].

ARGUMENT

Petitioner pursued an administrative appeal, in accordance with R. C. 2506.01, from the decision of discharge rendered by the Columbus Civil Service Commission. This appeal procedure permitted the reviewing court to determine that the administrative order or decision was unconstitutional. R. C. 2506.04. Petitioner failed to raise federal questions in the Common Pleas Court of Franklin County (court of first instance) or in the Court of Appeals for Franklin County. Instead, petitioner attempted to assert federal questions in the Ohio Supreme Court by way of the motion to certify the record of the Franklin County Court of Appeals [Petition For Writ of Certiorari, pp. 14, 36], which motion was overruled without opinion by the Ohio Supreme Court [Case No. 81-811].

Since the Ohio Supreme Court declined to review the judgment of the lower court, the Franklin County Court of Appeals is the highest court in which a decision was had. American Motorists Insurance Co. v. Starnes, 425 U. S. 637, 96 S.Ct. 1800, 48 L.Ed. 2d 263

(1976); McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 96 S.Ct. 1154, 47 L.Ed. 2d 366 (1976). However, petitioner did not raise federal questions before the Court of Appeals. Due to the fact that petitioner failed to timely and properly raise federal questions in her administrative appeal, no record focusing on these issues was developed by the parties and the state courts did not consider nor determine said issues. It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it appear affirmatively from the record that a federal question was presented for decision to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to the determination of the case. Lynch v. People of the State of New York, 293 U.S. 52, 79 L.Ed. 191 (1934); Honeyman v. Hanan, 300 U.S.14, 81 L.Ed. 477 (1937). With respect to case number 81-811, it is respectfully submitted that no federal question was timely and properly raised in the state courts nor decided therein which should be settled by this court.

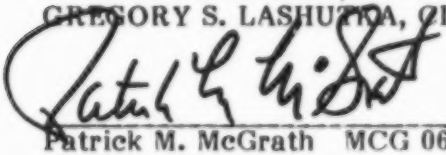
Petitioner attempted to raise state and federal constitutional questions in a collateral original action for writ of mandamus in the Ohio Supreme Court, Case No. 81-810, filed contemporaneously with Case No. 81-811. Respondents opposed this action on the grounds that petitioner had an adequate remedy at law by way of appeal, R. C. 2731.05, and that petitioner was precluded by the doctrine of res judicata from raising constitutional questions in the mandamus action because these questions could have been raised and determined by the state courts reviewing the administrative appeal, R. C. 2506.04. On consideration thereof, the Ohio Supreme Court sustained a motion to dismiss the original action in mandamus.

The only question which could be presented in Case No. 81-810 is whether the Ohio Supreme Court properly dismissed petitioner's petition in mandamus. In dismissing the action the Ohio Supreme Court did not determine a federal question, but rather determined state questions involving adequate remedy at law and res judicata. Where the highest court of the state

delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment. Stembridge v. State of Georgia, 343 U.S.541, 72 S.Ct. 834, 96 L.Ed. 1130 (1952). Based upon the foregoing, respondents respectfully request the Court to deny the petition for writ of certiorari.

Respectfully submitted,

CITY OF COLUMBUS, DEPARTMENT OF LAW
GREGORY S. LASHUTKA, CITY ATTORNEY



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Donald R. Keller, of Counsel

Appendix

APPENDIX A

IN THE MATTER OF ELENOR CATALINA

May 31, 1979

Dear Mrs. Catalina:

Hearings were held by the Civil Service Commissioners on the following charges and specifications:

Charge I.

Pursuant to Civil Service Rule XIII (C), you are charged with inefficiency, neglect of duty, and inability to perform your job as Personnel Analyst III for the City of Columbus.

Specification:

From the Fall of 1975 to September, 1978, you have been unable to perform your work at the level expected and required of a Personnel Analyst III. You have been unable and/or unwilling to do the various classification and testing work assigned to you in accordance with the standards established by your supervisors and the standards established by the EEOC Guidelines and the American Psychological Association Standards for Educational and Psychological Tests. For example, but not limited to, you did not adequately perform your testing and classification assignments with respect to the following matters:

A. Testing and Job Analysis
   1. Meter Reader
   2. Legal Secretary I and II
   3. Traffic Engineering Associates and Aides I and II

4. Street Cleaning Supervisor I and II
5. Street Maintenance Supervisor I and II

B. Classification.
1. Traffic Engineering Associate III
2. Traffic Signal System Supervisor
3. Traffic Maintenance Manager
4. Traffic Maintenance Assistant Manager
5. Traffic Signal Shop Supervisor II
6. Traffic Signal Shop Supervisor I
7. Electronics Technician II
8. Electronics Technician I
9. Traffic Line Worker Supervisor I
10. Traffic Line Worker Supervisor I
11. Traffic Line Worker II
12. Traffic Line Worker I
13. Traffic Line Worker Trainee
14. Trades Helper (Electrician)
15. Traffic Painting & Sign Worker Supervisor II
16. Traffic Paint Worker Supervisor I
17. Traffic Paint Worker II
18. Traffic Paint Worker I
19. Traffic Sign Worker Supervisor I
20. Traffic Sign Worker
21. Traffic Sign Shop Supervisor
22. Traffic Sign Painter-Fabricator
23. Traffic Sign Maker
24. Parking Meter Repairer Supervisor
25. Parking Meter Repairer
26. Equipment Operator Series

C. Filing system for exam items

From 1977 through September, 1978, you were advised that your work would have to improve. You were given numerous opportunities to improve the quantity and

quality of your work but you have been unable or unwilling to do so.

Charge II.

Pursuant to Civil Service Rule XIII (C) you are charged with inefficiency, neglect of duty, misfeasance, malfeasance and nonfeasance, insubordination, and violation or work rule 17, threatening, intimidating, coercing, or interfering with supervision, the public, or other employees.

Specification I.

On or about September 27, 1978, you referred to a supervisor as the "Idi Amin" of the Civil Service and implied that the supervisor could be killed if he did not stop harassing you.

Specification II.

For at least six months prior to your present vacation and sick leave you have harassed and intimidated various members of the staff of the Civil Service Commission on City time. Your continued interference with their work has caused staff inefficiency and uneasiness with your presence on the work premises. During the course of 1978, you continually failed to heed the advice of your supervisors with regard to wasting staff time, and continued in your efforts to undermine the role of your supervisors.

Upon due consideration of all of the evidence and the whole record, there is a finding of guilty as to each charge and specification.

Accordingly, the Commissioners have unanimously

determined and you are advised that you are discharged from your position as Personnel Analyst III.

Columbus Civil Service Commissioners

s/Thelma I. Schoonover
Dr. Thelma Schoonover

s/John C. Young
John C. Young

s/Walter Tarpley
Walter Tarpley

APPENDIX B

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Elenor Catalina,	:	
Appellant,	:	
v.	:	Case No. 79CV-06-2844
The Columbus Municipal Civil Service Commission et al.,	:	Judge Williams
Appellees.		

DECISION

Rendered this 25th day of April, 1980.

WILLIAMS, J.

This matter comes before the Court on an R. C. Sec. 2506.01 appeal from a decision of the Columbus Municipal Civil Service Commission upholding Appellant's discharge.

Several matters deserve comment based upon the record and the court file in this case. The hearing below was long and drawn out, largely due to the Commission's inability to meet for continuous sessions and a less than crisp presentation by Appel-

lant's counsel. Regardless of the problems of the hearing, counsel for Appellees should have graced the Court with more than a one page brief.

This case itself is a troubling one in that Appellant has served the city loyally for a number of years. One cannot help but wonder if the city and Appellant's superiors within the Commission staff do not bear at least some of the responsibility for the situation that developed for failing to exercise better control and management before this matter got completely out of hand.

Regardless of emotion or sympathy, the case turns on two factual questions:

1) Did Appellant have the personal relations problems with which she was charged?

2) Did Appellant have the problems with quality and quantity of work with which she was charged?

Both of these questions turn on which witnesses the Commission believed. The Court cannot second guess the Commissioners who had the crucial

opportunity to observe the demeanor of the witnesses. Based on the record of the testimony and the exhibits the Court can only conclude that the decision below is supported by reliable, probative and substantial evidence. Further, the decision is not contrary to law nor did the Commission abuse its discretion.

Appellees shall file a Judgment Entry reflecting these findings in accordance with Rule 39.01 of the Rules of this Court.

s/Frederick T. Williams
Frederick T. Williams, Judge

APPENDIX C

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY

Elenor Catalina,	:	
Appellant,	:	
	:	No. 80AP-392
Thelma I. Schoonover, Chairman, Columbus Municipal Civil Service Commission, and John C. Young, Member, Columbus Civil Service Commission, et al.,	:	
Appellees.	:	

D E C I S I O N

Rendered April 9, 1981

MOYER, J.

This matter is before us on the appeal of Elenor Catalina (Catalina) from a judgment of the Common Pleas Court of Franklin County affirming the decision of the Columbus Municipal Civil Service Commission (Commission) discharging Catalina from her employment.

On Friday, September 29, 1978, Catalina was

sixty-four years old and had been a classified employee of the Commission for twenty-two years. She was classified as a Personnel Analyst III. On that date, the Commission's executive secretary, then Dale Crawford, called Catalina to his office at 3:00 p.m. His testimony indicates that he told Catalina that, because of problems with her work and her relations with superiors in her office, she was to leave the premises. He also told her she would be paid for her work on that day and instructed her to call her supervisor the following Monday to indicate whether she would take a voluntary vacation or return to work and be suspended pending disciplinary proceedings. No written charges were issued to Catalina at that time.

Catalina did not return to work. She claims she periodically called her supervisor to tell him she was on involuntary leave. The executive secretary sent a letter to Catalina's attorney outlining conditions under which Catalina could return to her employment without facing disciplinary action. The conditions included an apology, "voluntary" demotion, and training,

all of which Catalina chose not to accept.

On February 13, 1979, Catalina filed a complaint in Common Pleas Court against the Commission, alleging she was being wrongfully excluded from her employment. The following day written charges were issued to Catalina. The Commission held a series of hearings and discharged Catalina on May 31, 1979.

Catalina appealed that decision to the Common Pleas Court of Franklin County, and her appeal to this court is from the judgment of the Common Pleas Court. In support of her appeal she raises the following seven assignments of error:

> "1. The Court erred in failing to find that the May 31, 1979 order of the Commission violated Columbus City Charter Section 149 and the rules thereunder requiring timely written charges.
>
> "2. The Court erred in holding that the Commission's actions were legal where a hearing was not promptly held as required by City Charter and Rules.
>
> "3. The Court erred in permitting the Commission's denial of cross-examination as to a written report received into evidence.
>
> "4. The Court erred in permitting the Commission's denial of proffered testimony as to the acts of its Executive Secretary in

effecting a removal without timely written charges.

"5. The Court erred in supporting the Commission's finding of alleged failure to follow equal opportunity guidelines where there was no evidence of such alleged failure.

"6. The Court erred in failing to find that the action of the Commission was unconstitutional, illegal, arbitrary, capricious, and/or unreasonable within the meaning of R. C. 2506.04.

"7. Irrespective of whether the discharge was legal, the Court erred in failing to find that the Commission's action was unsupported by the preponderance of substantial, reliable and probative evidence within the meaning of R. C. 2506.04."

The City Charter of Columbus and the rules promulgated thereunder require that an employee be given written charges prior to discharge or reduction in rank. Columbus City Charter, Section 149(m); Rules and Regs. of Municipal Civil Service Commission of Columbus, Rule XIII E. The Commission concedes that Catalina was given no written charges at the time she was originally excluded from her work place, September 29, 1978. However, she was served with written charges prior to the time any official disciplinary action was

taken against her. The charges were extensive and included an allegation of inefficiency, neglect of duty and inability to perform her job as a Personnel Anaylst III, as well as threatening and intimidating other employees which caused staff inefficiency and uneasiness. The second charge included a specific allegation that Catalina on September 27, 1978, referred to a supervisor as "the 'Idi Amin' of Civil Service and implied that the supervisor could be killed if he did not stop harassing you."

The charges are specific and detailed and comply with the requirements of the City Charter and regulations in question. The issue is whether those charges should have been given to Catalina prior to any job-related action by her employer. The Commission believed that the matter of due process was not before it in its hearing on Catalina's discharge. As written charges had been filed prior to the hearing, the Commission assumed jurisdiction had been properly invoked.

The trial court apparently also believed that

the matter of back pay for the period from September 29, 1978 to February 14, 1979, when Catalina was on voluntary or involuntary leave, should have been the subject of the suit filed by Catalina in Common Pleas Court in February of 1979. Although not a part of the record before us, that suit purportedly dealt with her alleged illegal exclusion from her employment, rather than the discharge which is the subject of the action before us. We agree with the trial court that if the jurisdiction of the Commission was properly invoked, as it was, the only matter before us for review is whether the action of the Commission in discharging Catalina was supported by the evidence properly adduced at the hearing.

It could be argued that the actions of the director of the Commission between September 29, 1978 and the date Catalina was given written charges were in effect a form of duress, which caused her to in effect be discharged from her job. A close review of the correspondence and the testimony of the director causes us to conclude that his actions cannot be so

defined. He gave Catalina several conditions under which she could return to her employment, one of which was a demotion in her job position. However, it is significant that the conditions were not a prerequisite to keeping her job but, rather, to the Commission's not initiating disciplinary action against her. She had been permitted to take a substantial amount of her vacation time following September 29, and sick leave following November 17, 1978, until January 29, 1979. During that period of time, no disciplinary action was taken against Catalina nor was she demoted or discharged. Her due process rights were not violated during that period of time.

The requirements of due process include, inter alia, a hearing before an impartial tribunal. Catalina complains about the impartiality of the Commissioners, although not raising it as an assignment of error. The fact that the Commission was both her employer and the tribunal before which her discharge was heard is an aberration in the law. However, any prejudice to her could have been cured by a trial de

novo in the Court of Common Pleas. Catalina apparently considered requesting a trial de novo but did not. She has, therefore, waived any defect which may have inured from the dual role of the Commission. The first assignment of error is not well taken and is overruled.

In support of her second assignment of error, Catalina argues that the Commission did not hold "prompt" hearings as required by the Columbus City Charter and the Commission Rules. Rule XIII F.2 requires that a first hearing be set for no later than ten days after the date of the filing of an appeal. Rule XIII F.i provides that a hearing may be continued for no more than ninety days. The charges against Catalina were filed February 14, 1979 and the first hearing held on February 26, 1979. Although it is not clear when Catalina's appeal to the Commission was filed, even if it was on February 14, there is nothing to indicate that the delay of two days in any way prejudiced Catalina. The final hearing on Catalina's case was held May 10, which is within ninety days of February 26 (or February 14). Catalina's second assignment of error is not well

taken and is overruled.

In support of her third assignment of error, Catalina claims the Commission denied her attempt at cross-examination of a witness with respect to a written report regarding Catalina'a work at the Commission. David Kriska testified regarding her work and later submitted a report concerning her work. The report was admitted into evidence. Catalina claims that she was denied the right of cross-examination of the witness regarding the unsworn document. However, a reading of the transcript reveals that Catalina's counsel objected to introduction of the document but did not request an opportunity to recall Kriska for cross-examination. There is no indication that Kriska was no longer available as a witness or that the Commission would have not recalled him. There was no denial of a right to cross-examination, and the third assignment of error is overruled.

Catalina argues that the Commission erred by failing to admit testimony of her brother concerning the events of September 29, 1978. As our discussion of

the first assignment of error makes clear, the circumstances of her exclusion from the work place at that time were not in issue before the Commission; the Commission was concerned only with her discharge and the evidence supporting the charges against her. The fourth assignment of error is overruled.

In her fifth assignment of error, Catalina challenges the Commission's finding that she had failed to follow equal opportunity guidelines. The evidence on that point is equivocal. However, the Commission sat as the trier of fact and we may not substitute our judgment for theirs. C. E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St. 2d 279. Even if the Commission had not found this charge to be valid, there was ample evidence to support the other allegations which in themselves would have justified Catalina's discharge. The fifth assignment of error is overruled.

Catalina's argument that the action of the Commission is unconstitutional, illegal, arbitrary, and capricious is not supported by her references to the record. We previously disposed of the question of

whether she was given written charges and a timely hearing. She fails to convince us that the action was illegal, arbitrary or capricious or unreasonable. Her references to the record are examples of the Commission's exercise of discretion against her. However, the Commission's action was not "so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty." Cincinnati v. Pub. Util. Comm. (1978), 55 Ohio St. 2d 168. The sixth assignment of error is overruled.

In support of her final assignment of error, Catalina asserts that the Commission's action was unsupported by the preponderance of substantial, reliable and probative evidence. The Supreme Court has made the following comments regarding the standard to be applied by reviewing courts under R. C. 2506.04:

> "* * *
>
> "Thus, it is quite evident that the Court of Common Pleas must weigh the evidence in the record, and whatever additional evidence may be admitted pursuant to R. C. 2506.03, to determine whether there exists a preponderance of reliable, probative

> and substantial evidence to support the agency decision. We caution, however, to add that this does not mean that the court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. The key term is 'preponderance.' If a preponderance of reliable, probative and substantial evidence exists, the Court of Common Pleas must affirm the agency decision; if it does not exist, the court may reverse, vacate, modify or remand.
>
> "In determining whether the standard of review prescribed by R. C. 2506.04 was correctly applied by the Court of Common Pleas, both this court and the Court of Appeals have a limited function. * * *." (Dudukovich v. Housing Authority (1979), 58 Ohio St. 2d 202, at 207.)

Catalina has referred to some evidence which supports her contention that her work was satisfactory. However, there is also a substantial amount of evidence from reliable sources which tends to prove the allegations against her. She has not convinced us that the evidence preponderates in her favor. The seventh assignment of error is not well taken and is overruled.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

STRAUSBAUGH, P.J., and COOK, J., concur.

COOK, J., of the Eleventh District Court of Appeals, sitting by assignment in the Tenth District Court of Appeals.

APPENDIX D

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus.	:	1981 TERM To wit: SEP 16 1981
Elenor M. Catalina,	:	No. 81-811
Appellant,	:	MOTION FOR AN ORDER DIRECTING THE COURT
v.		OF APPEALS
City of Columbus et al.,	:	for FRANKLIN County
Appellees.	:	TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

APPENDIX E

THE STATE OF OHIO :
: 1981 TERM
City of Columbus :

The State of Ohio, ex rel. To wit: Sep 23, 1981
Elenor M. Catalina,
Relator, :

v. : No. 81-810

Tom Moody, Mayor, et al., :

Respondents. : IN MANDAMUS

This cause originated in this court on the filing of a complaint for a writ of mandamus and was considered in the manner prescribed by law. On consideration thereof, it is ordered by the court that the respondents' motion for judgment on the pleadings is treated as a motion to dismiss and, as such, is sustained, and the cause is dismissed.

APPENDIX F

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO	:	
	:	1981 TERM
City of Columbus	:	
The State of Ohio, ex rel. Elenor M. Catalina,	To wit:	OCT 21, 1981
Relator,	:	
v.	:	No. 81-810
Tom Moody, Mayor, et al.,	:	
Respondents.	:	REHEARING

It is ordered by the court that rehearing in this case is denied.

APPENDIX G

RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS IN OHIO SUPREME COURT, NO. 81-810

Respondents hereby move this honorable Court for judgment on the pleadings for failure to state a claim upon which relief can be granted for the reasons that:

1) Relator had and exercised the adequate remedy of appeal to review the alleged errors complained of in the order of discharge. Relator cannot now perfect a second appeal by the method of writ of mandamus;

2) The cause of action asserted in the petition for mandamus is barred by the doctrine of res judicata;

3) The issues of fact and law asserted in the petition for mandamus have been litigated and determined by valid and final judgments and are hereby conclusive in this action between the same parties and their privy under the doctrine of collateral estoppel.

This motion is made pursuant to Rule VIII, Section 1, Supreme Court Rules of Practice, Civ. R. 12(B)(6), 12(C).

Respectfully submitted,

s/Donald R. Keller
Donald R. Keller, Trial Attorney
Sr. Asst. City Attorney
Attorney for Respondents

MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS

This is an original action in mandamus instituted in this Court by relator to obtain restoration to her civil service position as of the date of discharge, September 29, 1978 [Complaint, paragraph 9]. Plaintiff unsuccessfully appealed the discharge from the Municipal Civil Service Commission to the Common Pleas Court of Franklin County and to the Court of Appeals of Franklin County [Complaint, paragraphs 5, 6]. Both courts affirmed relator's discharge. Relator currently has pending in this Court a motion to certify the record in those appeals. [Elenor Catalina v. Thelma I. Schoonover, et al., Case No. 81-811, filed May 29, 1981]. By this action relator merely adds three (3) nominal parties, namely Mayor Tom Moody, City Auditor Hugh Dorrian and City Treasurer David Ort. The remaining respondents, Columbus Municipal Civil Service Commission, and Commissioners Schoonover, Espy and Cloud, are named appellees in the administrative appeal.

A. Adequate Remedy At Law.

Relator timely appealed her discharge pursuant to R. C. 2506.01 from the action of the Columbus Municipal Civil Service Commission. The appeal afforded by R. C. § 2506.01 has been previously determined by this Court to be an adequate remedy in the ordinary course of law for employees discharged from the City of Columbus. State, ex rel. Fagain v. Stork (1963), 174 Ohio St. 330.

In State, ex rel. Bargar v. Ross (1978), 53 Ohio St. 2d 118, this Court affirmed the dismissal of a complaint in mandamus, for failure to state a claim upon which relief can be granted, filed by a state employee who had been terminated from employment with the State of Ohio. In that case the employee had already invoked the jurisdiction of the State Personnel Board of Review and had unsuccessfully appealed that Board's decision denying him relief to the Court of Common Pleas, the Court of Appeals and to the Supreme Court. This Court ruled that mandamus is not a method to obtain successive appellate reviews of the same issue.

In State, ex rel. Farmer v. McCormick (1961), 171 Ohio St. 530, this Court ruled that a discharged police officer who had and exercised the adequate remedy of appeal from an order of dismissal could not have a second review by a proceeding in mandamus. As in the case at bar, the relator had an appeal pending at the time the action in mandamus was instituted.

There is little difference between the instant petition in mandamus and those which were prosecuted in State, ex rel. Bargar, supra, and State, ex rel. Farmer, supra. In this case relator attempts to invoke the constitutional jurisdiction of the Court. In such a case R. C. § 2731.05 cannot act as a bar or a limitation on this Court in considering the writ of mandamus. State, ex rel. Sibarco Corp. v. Hicks (1964), 177 Ohio St. 81, 82; State, ex rel. Libbey-Owens-Ford Glass Co., v. Industrial Commission of Ohio (1954), 162 Ohio St. 302. However, in State, ex rel. Sibarco Corp. v. City of Berea (1966), 7 Ohio St. 2d 86, cert. den. 386 U.S.957, this Court overruled or disapproved all decisions or pronouncements of the Court contrary to the principle

that a writ in mandamus must not issue where there is a plain and adequate remedy in the ordinary course of law, as follows:

> 1. The writ of mandamus must not be issued, whether in the exercise of the Court's discretion or otherwise, when there is a plain and adequate remedy in the ordinary course of law. (Second paragraph of the syllabus of State, ex rel. Wesselman v. Board of Elections of Hamilton County, 170 Ohio St. 30, is overruled, and any decision or opinion of this Court or any part thereof that is in conflict with the foregoing principle of law is disapproved.)

Respondents respectfully submit that relator had and exercised an adequate remedy of appeal by way of R. C. § 2506.01 from her discharge from employment with the Columbus Municipal Civil Service Commission. Not only did relator affirmatively plead such appeals in her petition, she also simultaneously moved the Court to certify the records of such proceedings and/or consolidate the same herewith. The existence of the adequate remedy at law preempts this Court's discretion and requires denial of the writ. State, ex rel. Pressley v. Industrial Commission (1967), 11 Ohio St. 2d 141. The fact that relator has been unsuccessful in the

administrative appeal does not entitle her to substitute a writ of mandamus as an indirect means of perfecting a second appeal.

Additionally, the relief sought by relator is to determine a controversy of a strictly private nature [i.e. reinstatement and back pay.] A writ of mandamus for such relief will ordinarily be refused by this Court under its constitutional powers unless the relator shows affirmatively that the relief sought is not merely to determine a controversy of a strictly private nature. State, ex rel. Libbey-Owens-Ford Glass Co., v. Industrial Commission of Ohio (1954), 162 Ohio St. 302; State, ex rel. Allied Wheel Products, Inc. v. Industrial Commission (1954), 161 Ohio St. 555.

B. Res Judicata;

In Norwood v. McDonald (1943), 142 Ohio St. 299, this Court held:

> 1. A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a

complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.

* * *

3. A point or a fact which was actually and directly in issue in a former action and was there passed upon and determined by a court of competent jurisdiction may not be drawn in question in any future action between the same parties or their privies, whether the cause of action in the two actions be identical or different.

4. To determine whether a second action is based upon the same cause of action as that litigated in a former action claimed to be a bar to the second action under the doctrine of res judicata, the primary tests are the identity of investitive facts creating the right of action in each case; the identity of the evidence necessary to sustain each action; and the accrual of the alleged rights of action at the same time.

5. A legal right is an interest with which the law invests a person, and for the infringement of which it gives him a remedy. The investiture of such right arises from and depends upon operative facts and circumstances which, under the law, create the right, preserve it and assure a remedy for its infringement.

* * *

8. While all claims of right embraced in a single cause of action must be prosecuted simultaneously, a litigant cannot be required to prosecute simultaneously in a single action multiple causes of action, even though they relate to the same subject matter.

It is manifest that the Common Pleas Court and Court of Appeals of Franklin County were courts of competent jurisdiction for relator's administrative appeal from discharge. Of particular significance as to relator's constitutional claims is R. C. Section 2506.04 which reads:

> The court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication or decision, or remand the cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law pursuant to sections 2505.01 to 2505.45, inclusive, of the Revised Code. (Emphasis added.)

Thus, the reviewing courts had the jurisdiction to hear and determine assertions of constitutional infirmities in the administrative appeal.

Respondents herein are definitely in privity with appellees in relator's R. C. Section 2506.01 appeal. The addition of respondents Mayor Moody, Auditor Dorrian and Treasurer Ort as nominal parties [presumably for purposes of enforcing any back pay award] does not alter the nature of the parties-defendants. The real party in interest is the City of Columbus, Municipal Civil Service Commission. Cf., Trautwein v. Sorgenfrei (1979), 58 Ohio St. 2d 493, 501. It cannot be seriously controverted that all respondents had an interest in the administrative appeal prosecuted by relator, and thus are in privity, one with another. Whitehead v. General Telephone Co. (1969), 20 Ohio St. 2d 108.

In this action, as in relator's administrative appeal, relator contests the alleged denial of due process arising from the events leading up to, and including the disciplinary hearing and alleged illegality of the order of discharge. [See, Elenor Catalina v. Thelma I. Schoonover, et al., Case No. 81-811]. The primary tests to determine whether a second action is based upon the same cause of action as that litigated in

the former action set forth in Norwood, supra, (i.e. investitive facts creating the right of action, evidence necessary to sustain each action, and the accrual of the alleged rights of action at the same time) are met in this case.

Norwood, supra, requires that all claims of right embraced in a single cause of action must be prosecuted simultaneously. In her administrative appeal, relator failed to identify all of the legal theories of recovery (i.e. separate constitutional sections) set forth in Complaint paragraph 8. However, the doctrine of res judicata bars their assertion herein because the operative facts and circumstances of this action and the former action are one and the same.

C. Collateral Estoppel.

In Hicks v. De La Cruz (1977), 52 Ohio St. 2d 71, 77, this Court stated:

> The modern view of res judicata embraces the doctrine of collateral estoppel, which basically states that if an issue of fact or law actually is litigated and determined by a valid and final judgment, such determination being essential to that judgment, the deter-

> mination is conclusive in a subsequent action between the parties, whether on the same or a different claim. A party precluded under this principle from relitigating an issue with an opposing party likewise is precluded from doing so with another person unless he lacked full and fair opportunity to litigate that issue in the first action, or unless other circumstances justify according to him an opportunity to relitigate that issue. Restatement of the Law 2d, Judgments (Tent. Draft No. 4 [1977]), Section 68, at page 1, and (Tent. Draft No. 2 [1975]), Section 88, at pages 89-90.

In Elenor Catalina v. Thelma I. Schoonover, et al., Case No. 80AP-392, unreported, rendered April 9, 1981 [copy attached hereto as Appendix A], currently pending on motion to certify, Case No. 81-811, the Court of Appeals determined that 1) relator's due process rights were not violated from September 29, 1978 through January 29, 1979; 2) relator waived any alleged defect regarding the impartial tribunal; 3) relator's disciplinary hearing was "prompt"; and 4) the action of the Civil Service Commission was not illegal or unconstitutional. Thus, the material issues of law and fact herein asserted where litigated and determined during the administrative appeal. Relator is precluded from relitigating these issues with respondents herein

on the basis of the doctrine of collateral estoppel.

Respectfully submitted,

s/Donald R. Keller
Donald R. Keller, Trial Attorney
Senior Assistant City Attorney

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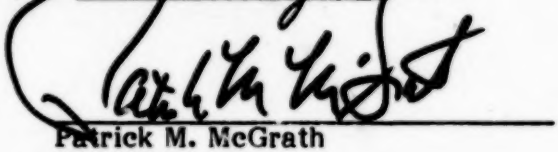
CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Brief In Opposition was mailed by regular U.S. Mail, postage prepaid to Robert D. Holmes, Attorney for Petitioner-Appellant, 16 East Broad Street, Columbus, Ohio 43215, this 3rd day of February, 1982.



Patrick M. McGrath
Chief Counsel